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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

The government hereby objects to the Defendant's motion because the Court considered Defendant's financial condition at sentencing, six weeks ago, and correctly determined that he has ample financial resources. Furthermore, waiver of interest prevents Defendant's victim from recovering full and timely restitution, including post-judgment interest, to which they are entitled under the MVRA.

FACTS

On December 11, 2023, the Court imposed a judgment against Defendant Miklos Daniel Brody (“Judgment,” Dkt. No. 225), ordering Defendant to pay \$529,266.37 in restitution, a \$1,000.00 fine, and a special assessment in the amount of \$300.00. *Id.* The Court did not waive interest at the time of sentencing, nor did Defendant raise the issue. *See Judgment, at 6; see generally Dec. 11, 2023 Tr.*

1 Interest accrues at the rate of 4.88%, or a daily rate of \$68.41. Therefore, the interest that would
 2 accrue during Defendant's anticipated period of incarceration is approximately \$42,619.43.

3 **LEGAL AUTHORITY**

4 Restitution, just like the term of incarceration, supervised release, and fines, are part of
 5 sentencing. *See* 18 U.S.C. §§ 3556 (“The court, in imposing a sentence on a defendant who has been
 6 found guilty of an offense shall order restitution in accordance with section 3663A The procedures
 7 under section 3664 shall apply”), 3663A(a)(1) (“when sentencing a defendant convicted of an
 8 offense described in subsection (c), the court shall order . . . that the defendant make restitution to the
 9 victim”), and 3664(o) (“A sentence that imposes an order of restitution is a final judgment”);
 10 Fed. R. Crim. P. 32.

11 By statute, defendants “*shall* pay interest on any fine or restitution of more than \$2,500,” unless
 12 “the court determines that the defendant does not have the ability to pay interest.” 18 U.S.C. § 3612(f)
 13 (emphasis added). In other words, if the Court does not waive the interest at the time of sentencing, upon
 14 a determination of defendant’s ability to pay, then interest applies automatically pursuant to 18 U.S.C. §
 15 3612(f)(1). *See United States v. Radi*, 340 Fed. Appx. 401, 403 (9th Cir. 2009) (“Although district courts
 16 have the authority to waive interest, 18 U.S.C. § 3612(f)(3), the law *presumes* that interest will accrue on
 17 restitution awards in excess of \$2,500, 18 U.S.C. § 3612(f)(1).”) (emphasis added).

18 Interest assessed on restitution is paid to victims. *United States v. Pescatore*, 637 F.3d 128, 145
 19 (2d. Cir. 2011) (citing Administrative Office of the United States Courts, Guide to Judiciary Policy vol.
 20 13, § 810.50.10(a)(2) (Aug. 3, 2010). Victims are entitled to “full and timely restitution.” 18 U.S.C.
 21 § 3771(a)(6).

22 Waiver of interest is at the Court’s discretion. 18 U.S.C. § 3612(f)(3) (“If the court determines
 23 that the defendant does not have the ability to pay interest under this subsection, the court *may* waive the
 24 requirement for interest”) (emphasis added). In exercising its discretion, “indigency is a necessary, but
 25 not in itself a sufficient, condition to waiver.” *United States v. Dang*, 492 Fed. Appx. 730, 731 (9th Cir.
 26 2012).

27 A criminal judgment including restitution is a final judgment upon its entry. 18 U.S.C. § 3664(o).
 28 The restitution order can only be modified based on statute or rule, such as the limited set of options set

1 forth in 18 U.S.C. § 3664(o)(1). *See United States v. Hankins*, 858 F.3d 1273, 1277 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 650 (2018) (“Once a restitution order is imposed, the MVRA leaves the district court with limited options to modify restitution.”). None of the limited options referenced in § 3664(o)(1) include waiving interest. Moreover, 18 U.S.C. § 3612(h) is the only statutory provision that permits waiver of interest, and that authority is vested with the Attorney General upon the Attorney General’s determination that “reasonable efforts to collect the interest...are not likely to be effective.” 18 U.S.C. § 3612(h).

8 ARGUMENT

9 Defendant improperly asks the Court to waive his restitution interest, six weeks post-judgment,
 10 and without regard for the victim. The Court had the opportunity to consider Defendant’s financial
 11 condition at time of sentencing – it determined Defendant had the ability to pay a fine. Judgment, at 6.
 12 *See generally*, PSR. Once the Judgment is final upon its entry, the Court has limited options to modify
 13 restitution, of which waiver of interest is not one.

14 A. **The Restitution Interest Cannot Be Waived by the Court After Final Judgment**

15 Post-judgment application of 18 U.S.C. § 3612(f)(3) is not permitted after the judgment is
 16 entered and becomes final. 18 U.S.C. 3664(o); *see United States v. Hankins*, 858 F.3d 1273, 1277 (9th
 17 Cir. 2017), *cert. denied*, 138 S. Ct. 650 (2018). Section 3664(k) of Title 18 of the United States Code is
 18 one of the limited means a restitution order may be modified after the imposition of final judgment. *See*
 19 18 U.S.C. § 3664(o)(1). However, modification under § 3664(k) affects the timing of payments, but not
 20 the amount of the total debt owed. *See* 18 U.S.C. § 3664(k) (“Upon receipt of the notification [of change
 21 in defendant’s economic circumstances], the court may...adjust the payment schedule[.]”)

22 Here, Defendant cannot petition the Court to waive interest post-judgment because the Court
 23 already declined to waive interest at time of sentencing. *See* Judgment, Dkt. No. 225 at 6 (box to waive
 24 interest is not checked). When the Judgment—as here—is silent as to the imposition of interest, 18
 25 U.S.C. § 3612(f), which has mandatory language, controls: “The defendant shall pay interest on any fine
 26 or restitution of more than \$2,500[.]” 18 U.S.C. § 3612(f)(1). In fact, post-judgment, the only
 27 mechanism to waive interest is if the Attorney General determines reasonable efforts to collect the
 28 interest would be ineffective. 18 U.S.C. § 3612(h). Giving the post-judgment authority to waive interest

1 to the Attorney General contradicts a conclusion that the courts also have the same authority. Defendant
 2 has not demonstrated why his financial condition has changed so drastically in the six weeks between
 3 sentencing and this motion that calls for modification of his restitution payments.

4 Moreover, because Defendant has the ability to pay, as demonstrated by this Court's imposition
 5 of a fine, waiving interest on restitution is to deprive victims of their rightful property. Interest accrued
 6 on restitution is paid to the victims who suffered loss as a result of Defendant's criminal conduct. *See*
 7 *United States v. Pescatore*, 637 F.3d 128, 145 (2d. Cir. 2011) (citing Administrative Office of the United
 8 States Courts, Guide to Judiciary Policy vol. 13, § 810.50.10(a)(2) (Aug. 3, 2010) ("interest assessed on
 9 restitution is paid to the victim.")) . Restoring to victims some measure of the foregone time value of
 10 money during the time while Defendant deprived them of their funds is consistent with the bedrock
 11 principle of restitution to make a victim whole. *See United States v. Newman*, 659 F.3d 1235, 1241 (9th
 12 Cir. 2011) ("the purpose of restitution...is not to punish the defendant, but to *make the victim whole*
 13 *again* by restoring him or her the value of the losses suffered as a result of the defendant's crime.")
 14 (emphasis in original).

15 Therefore, because the Court could have waived interest at time of sentencing six weeks ago, but
 16 declined to do so, the default rule of imposing interest applies and interest may not be waived post-
 17 judgment.

18 **B. The Defendant Has the Ability to Pay Interest to His Victims**

19 The Court correctly determined at the time of sentencing that Defendant does not qualify for a
 20 waiver of interest because he has sufficient assets to pay interest on restitution. Waiver of interest is
 21 discretionary. 18 U.S.C. § 3612(f)(3). *See United States v. Dang*, 492 Fed. Appx. 730, 731 (9th Cir.
 22 2012). In exercising its discretion, "indigency is a necessary, but not in itself a sufficient, condition to
 23 waiver." *U.S. v. Dang*, 492 Fed. Appx. at 731.

24 This case is markedly different than the facts presented in *Jones*, the sole Circuit authority
 25 Defendant cites in support of his motion. The *Jones* defendant sought relief five years after sentencing.
 26 At the time of the *Jones* defendant's motion seeking various forms of relief, the *Jones* court found he
 27 was unemployed, did not have prospects for work due to his age and physical state, was subsisting on
 28 government benefits, and had no other meaningful assets. *United States v. Jones*, 2023 WL 4238478, *1

1 (N.D. Cal. 2023). In contrast, Defendant’s motion comes a mere six weeks after sentencing, when the
2 Court just had the opportunity to consider Defendant’s economic circumstances. Defendant is a healthy
3 38 year-old individual, has a college degree and work experience, and has substantial assets such that the
4 court found Defendant had the ability to pay a fine and did not waive interest on restitution. Defendant
5 has ample prospects to earn a living after his 24-month period of incarceration, and repay his victim the
6 full restitution to which they are entitled.¹

7 The U.S. Attorney's Office may exercise its authority to waive interest under 18 U.S.C.
8 § 3612(h), upon an assessment of Defendant's economic circumstances to support a determination that
9 "reasonable efforts to collect the interest or penalty are not likely to be effective." Here, given
10 Defendant's likely ability to earn income and accrue assets during the 20-year restitution enforcement
11 period, the U.S. Attorney's Office would not consider it reasonable at this early stage to deprive victims
12 the opportunity to collect interest.

CONCLUSION

14 The government respectfully requests that the Court deny Defendant's request to stay accrual of
15 interest on restitution during the period of Defendant's incarceration.

17 | Dated: January 30, 2024

Respectfully submitted,

ISMAIL J. RAMSEY
United States Attorney

By: /s/ Shining J. Hsu
SHINING J. HSU
Assistant United States Attorney

Counsel for the United States of America

27 ¹ The Defendant refers to the Court's recent stay of co-payments of assigned counsel fees in
28 support of this motion to waive interest. *See* Dkt. 234 (citing Dkt. 227). However, a stay of assigned
counsel fees, which would be paid to the CJA Fund, is of a different nature than the payment of full
restitution to victims.